No. October Term, 1940

In the Supreme Court of the United States

READING COMPANY

Petitioner

v.

THOMAS E. LARKIN

Respondent

BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI

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The opinion rendered by the United States District Court for the Middle District of Pennsylvania, in this case, will be found at page 151 of the Record.

The opinion rendered by the United States Circuit Court of Appeals for the Third Circuit will be found at page 157 of the Record.

The sole question involved is whether the plaintiff was engaged in interstate transportation at the time he was injured on January 9, 1937, and the case involves the application of the Act of Congress, the Federal Employers' Liability Act, of April 22, 1908, c. 149, 45 USCA Sec. 51, which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Terri-

tories, or between any of the States and Territories or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

This act was later amended, but not until more than two years after the cause of action accrued: Act of August 11, 1939, 45 USCA Section 51.

This act, however, is not applicable to cases of injuries sustained before its effective date:

Christenson v. Union Pacific R. R., 290 N. W. 246.

Painter v. B. & O. R. R. Co., 339 Pa. 271. (Advance Reports, October 18, 1940).

In any event, while this amendment may enlarge the class of railroad employees coming within the provisions of the Federal Employers' Liability Act, it in no way changes the established rules to be applied in determining what constitutes interstate commerce.

THE PLAINTIFF AT THE TIME HIS INJURIES WERE SUSTAINED WAS NOT ENGAGED IN INTERSTATE TRANSPORTATION, OR IN WORK SO CLOSELY RELATED TO IT AS TO BE PART OF IT

The trial Court reserved the following points submitted by the defendant:

> TENTH: Plaintiff has failed to prove that he was engaged in interstate transportation, or work so closely related thereto as to be a part of it at the time of the injury, and the verdict of the jury must be for the defendant.
>
> ELEVENTH: Under all the evidence in the case, the verdict of the jury must be for the defendant. (R. 139).

The burden was on the plaintiff to show that the case was within the Federal Act.

> Osborne v. Gray, 241 U. S. 16.
>
> Hench v. Pennsylvania Railroad Company, 246 Pa. 1.
>
> Painter v. B. & O. R. R. Co., 339 Pa. 271. (Advance Reports October 18, 1940), and cases cited.

The work of a switching crew in a yard is separable, at one time the crew being engaged in interstate service and at another in intrastate, and the right to recover under the Federal Act depends solely upon the character of the work in which the employe was engaged at the time he met with the injury.

Neither the character of the employment generally, nor its actual or anticipated character at some other time than that of employe's injury, is of itself determinative of the applicability of the Federal Law but instead the test is

whether the employe was engaged in interstate transportation within the meaning of the act at the very moment the injury was received. Mulcahy v. Terminal R. Ass'n., 123 S. W. (2nd) 235 (1939).

One seeking damages for death under the Federal Employers' Liability Act has the burden of establishing the fact that defendant, at the very time when its employe was killed, was engaged in interstate commerce, the presumption being, in the absence of such proof, that the employer while in the use and operation of its railway within the State was engaged in intrastate commerce. Johnson v. Southern Pacific Company, 248 Pac. 501.

Under the orders given to the crew, of which the plaintiff was a member, on the morning of the accident, there were but four cars involved, and each one of these four cars was moving in intrastate transportation, having originated at a point in Pennsylvania and being destined to a point in Pennsylvania. These cars were moving as follows:

Reading No. 24626—Coal, from Rutherford, Pennsylvania to Gettysburg, Pennsylvania.

Reading No. 73165—An empty car being shifted in the Rutherford Yard.

Reading No. 83522—Ashes, from Rutherford, Pennsylvania to Steelton, Pennsylvania.

Reading No. 92095—Electric tool car, from Rutherford, Pennsylvania to Wayne Junction, Philadelphia, Pennsylvania.

The Circuit Court of Appeals for the Third Circuit held that the two last mentioned cars, Reading No. 83522, containing ashes, and Reading No. 92095, a tool car, did not figure in a forward movement of interstate commerce.

THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, IN AFFIRMING THE JUDGMENT OF THE DISTRICT COURT, ERRED IN HOLDING AS A MATTER OF LAW THAT THE COAL CAR, READING NO. 24626, WAS MOVING IN INTERSTATE COMMERCE AT THE TIME OF THE ACCIDENT

The coal in Reading No. 24626 was originally contained in B. & O. No. 327256. This latter car was derailed in Harrisburg, enroute to the Rutherford Yards, on December 7, 1936, more than a month prior to the accident. Within a few days thereafter, the coal, which had been reloaded in Reading No. 24626; was taken by the Railroad Company for its own use. The through bill of lading under which it was moving in interstate service, was surrendered, the name of the consignee appearing thereon was changed from Consolidation Coal Company to Reading Company, Harrisburg was substituted for Port Reading as the place of destination, and a notation stamped upon it showing that the coal had been taken for Company needs. On December 30, 1936, this waybill was forwarded by J. S. Klinedinst, Agent for Reading Company at Harrisburg, to W. E. Murphy, Auditor of Freight Traffic at Philadelphia, with the advice that the coal had been ordered by C. E. Chamberlin, Superintendent of Reading Company, for Company use. (R. 45). On December 11, 1936, A. T. Owen, Superintendent of Transportation of Reading Company, by letter, advised the Consolidation Coal Company, that B. & O. car No. 327256 "was found on our line to be damaged *and will not go forward to destination,*" (Italics supplied) and requested that claim for the value of the coal be made. (R. 54). Under date of December 22, 1936, received by Reading Company on December 30, 1936, the Consolidation Coal Company presented its formal claim for $69.32, the value of the coal so taken, attaching thereto the original

letter from the Superintendent of Transportation advising that the coal would not go forward to destination (R. 51-55). This claim was received by Reading Company on December 30, 1936, but was not actually paid until put through in the January accounts on January 21, 1937 (R. 51-55).

The waybill for Reading No. 24626, covering the movement from Rutherford, Pennsylvania, to Gettysburg, Pennsylvania, also indicated that the coal had been spilled from the B. & O. car, and that it had been taken for Company use (R. 48).

The interstate movement of this lading had been broken and had ended long before the accident to the plaintiff, at which time it was moving as an independent shipment from Rutherford to Gettysburg. The plaintiff himself testified that this car, which passed over his arm, was to be placed in position to go west, the direction of Gettysburg from Rutherford. Port Reading, New Jersey, the destination named on the original through bill of lading, is east of the yard.

That this was an independent shipment, in no way related to the interstate movement, was practically conceded by the trial court and counsel for plaintiff.

At the conclusion of the charge of the court, counsel for the defendant made the following statement:

> "In connection with the B. & O. car I desire to call the Court's attention to the fact that after the lading of coal was spilled it was reloaded into another car and moved to Rutherford in December, and the salvaged coal bought by the Reading Company, and on the day of the accident it was moving as an entirely independent shipment from Rutherford to Gettys-

burg and the Reading Company had notified the Consolidated Coal Company that it would not go forward to its original destination, and that they should put in a claim for the value of the car of coal and that claim was put in by the coal company for the coal."

By The Court:

(Addressed to counsel for the plaintiff.)

"There is no objection to that, is there—do you object to that?"

By Mr. Kunkel, of counsel for the plaintiff:

"Well, no, that is correct."

By The Court:

"All right, the jury is instructed according to the statement of Mr. Brady." (R. 139-140).

In the foregoing statement, counsel for defendant inadvertently used the word "bought," but it clearly appears the coal company, which was both consignor and consignee, was notified that the shipment had been taken by Reading Company, would not go forward to its original destination, and that it should put in a claim for the value of the coal. (R. 54).

The Circuit Court of Appeals in its opinion makes no mention of the advice given to the coal company that the car would not go forward to destination, and treats the claim of that company as an offer to sell which was not accepted by Reading Company until after the accident. The record evidence, however, shows that this was a formal claim for loss or damage, represented by the value of the coal, submitted in response to the request of the railroad. This is shown by the claim itself, submitted on a form pre-

pared for this purpose (R. 52-53), as well as by the letter from G. W. Kratz, Controller of the coal company, addressed to the Freight Claim Agent of Reading Company, referring to the demand as a claim and requesting that it be placed in course for prompt settlement (R. 51). No contract involving the sale of the coal by the coal company and its purchase by the railroad company was contemplated. The right of action of the coal company was complete upon the breach of the original contract to transport from point of origin in West Virginia to destination in New Jersey, and under the through bill of lading issued by the Baltimore and Ohio Railroad Company, this claim might have been prosecuted against that Company, if the consignor had so elected: 49 USCA Section 20 (11). Where an interstate movement is interrupted by reason of an accident, whether or not such interstate trip is later continued, cannot depend upon the matter of acceptance or payment of the claim of the consignor growing out of failure to deliver. In some instances, no terms of settlement can be agreed upon, and suit results. Even though Reading Company, by appropriating the coal in question, may have laid itself open to a claim for damages growing out of wrongful conversion and failure to deliver, the coal company, which, as stated, was both consignor and consignee, acquiesced in such taking, and limited its claim to the value of the coal, thereby surrendering all control over the shipment.

The trial court left it to the jury to determine whether there had been any change, up to the time of plaintiff's injury, with respect to the original destination of this coal car. The United States Circuit Court of Appeals very properly held that, with respect to this car, the character of plaintiff's employment at the time of the accident was one of law for the court: Philadelphia & Reading Railway Company v. Hancock, 253 U. S. 284, 285. To the same effect

are N. C. R. R. v. Zachary, 232 U. S. 248-259, and Lehigh Valley Railroad v. Barlow, 244 U. S. 183.

It is submitted, however, that under all the evidence, as a matter of law, the plaintiff in connection with the movement of this car was not engaged in interstate transportation at the time of his injury.

While the plan or purpose of the shipper and the railroad company originally was to transport the coal from West Virginia to New Jersey, this was terminated by the action of the parties.

In support of its position, the United States Circuit Court of Appeals cites Binderup v. Pathe Exchange, 263 U. S. 291, 309. This Court, however, in that case, distinctly recognized that the temporary interruption in the interstate movement there under consideration was merely a convenient step in the process of getting the shipment to its final destination. See also Philadelphia & Reading Railway Company v. Hancock, 253 U. S. 284.

The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce:

> Atlantic Coast Line Railroad v. Standard Oil Company, 275 U. S. 257, 268.
>
> Crow v. Ursina and North Fork Railway Company, 64 Pennsylvania Superior Ct. 553, and cases cited.

The essential character of the commerce is governed by the intent of the parties controlling the movement of the traffic:

> Memphis Merchants Exchange v. Illinois Central Railroad Company, 43 Inter. Com. Rep. 378.

Where a car being transported in interstate service is interrupted, whether or not the interstate trip is subsequently continued, depends upon a continuity of movement, combined with a unity of plan on the part of the shipper and the carriers:

Colt v. Erie Railroad, 131 N. E. 737, 738.

Sherman v. Southern Pac. Co. 93 P. (2d) 812.

Here there was no continuity of movement, and the plan to transport to New Jersey had been ended by the railroad company with the consent of the coal company. The shipment was carried to Gettysburg under a new waybill, in the reverse direction from that specified in the original bill of lading, in pursuance of the plan determined upon prior to the accident. No freight charges were assessed for this movement, for the reason that the waybill indicated that the coal was Company material. Both the trial court and the Circuit Court of Appeals referred to the date when the title to the coal passed from the original consignor to the defendant. This may be disregarded as unimportant. The only matter for consideration is whether or not the car containing the coal was being moved in interstate or intrastate transportation at the time the plaintiff sustained his injury.

THE TESTIMONY OF THE PLAINTIFF CONCERNING STATEMENTS ALLEGED TO HAVE BEEN MADE TO HIM BY THE CONDUCTOR OF THE CREW AS TO THE PLACEMENT OF THE EMPTY CAR, READING No. 73165, AND ITS INTENDED USE, WAS INADMISSIBLE

In reply to a question from his counsel as to the instructions he had received from the conductor of his crew on the morning of the accident, the plaintiff testified:

> "I asked him what we were to do and he says go in on the power house and get two cars, one car of ashes, and one empty coal car, then we were going down on 17 track and get a tool car and a car of coal off 17 track, we got the car of ashes and the empty coal car off the power house, that empty car we were going to place under the coal trestle or gravity dump." (R. 20)

Later, after describing the work that had been done prior to the accident, he further testified:

> "the next movement was to take the empty coal car east on the thoroughfare and put in this empty coal car under the coal trestle to be loaded with coal from a crippled coal car there." (R. 23)

This also was based solely upon the statement made by the conductor.

These statements were purely hearsay, being an alleged repetition of orders said to have been given by Yard Master Cleckner to Conductor Hocker. Both Mr. Cleckner and Mr. Hocker denied that the statements had been made. Yard Master Cleckner testified as to the instructions he had given to Conductor Hocker, as to the disposition to be made of the four cars (R. 81), and was fully corroborated

by Conductor Hocker (R. 89). As to the empty coal car, Reading No. 73165, his direction was, "place it on the extention of the transfer dock." (R. 81). He further testified that at that time he had no knowledge of the purpose for which this car was to be used, as more fully set forth on page 6 of the petition for writ of certiorari. The plaintiff had no conversation with the yard master. Further, the alleged statement by the conductor that the car was "to be loaded with coal from a crippled coal car there," was inadmissible, for the reason that it was not within the scope of his authority, and cannot bind the defendant as tending to prove in any way that the car had been assigned to interstate transportation at the time of the accident. Assuming that it might be desirable for all members of the crew, as well as the conductor in charge, to know in advance where the car was to be spotted, it was not necessary for any one, not even the conductor, to know the use to which it would be put after their work had ceased. Throughout the opinion of the Circuit Court of Appeals, reference is made to the fact that at the time the alleged orders were given to the crew, of which the plaintiff was a member, to place the empty car under the loading dock, the crippled car was then standing on the tipple. Except for the hearsay testimony given by the plaintiff, there is no evidence that his crew had been instructed to place the empty car under the tipple, the evidence of the yardmaster and of the conductor being that the car was to be spotted on the extension track at the trestle. There is nothing to indicate that the crippled car was then standing on the tipple. It is true that the plaintiff says that he understood Reading 73165 was "to be loaded with coal from a crippled coal car there," but the word "there" must be read in connection with his previous statement that the empty car was to be placed under the coal trestle, or gravity dump, and indicates merely the location to which the car was to be shifted. The opinion of the Court states that the fact that the crippled coal car was standing on the tipple appears from

the testimony of the yard master. At the time the plaintiff reported for work, the yard master testified that he had no knowledge whatever as to the use that would be made of the empty car, and this was also the testimony of Conductor Hocker, in charge of the crew of which the plaintiff was a member, who testified that he had no information on the subject. The testimony referred to in the opinion was that given by the yard master in connection with his instructions to the second crew assigned to the movement of this car after the accident, when he said that at that time he did order the car to be placed under the coal trestle, although even then he had no knowledge as to what would be emptied into it. (R. 87). It must be remembered, however, that the instructions to the plaintiff's crew were given when they reported for work at 8:15 A. M. Thereafter they shifted the power house siding and subsequently, when arranging to pick up other cars, the accident happened. Some little time must of necessity have been consumed in the work done by the crew, as well as in caring for the injured employee after the unfortunate accident. The instructions to the second crew were not given until twenty or thirty minutes after the accident.

Therefore the statement attributed to the conductor that the car was to be placed under the dock, there to be loaded with coal from a crippled car, should have been excluded as hearsay, and not within the scope of the agent's authority.

It is submitted that this ruling of the Circuit Court of Appeals is in direct conflict with its own decision in Alexander Mirkowicz v. Reading Company, tried in the District Court of the United States for the District of New Jersey, in 1935. There the cars which the plaintiff and the crew to which he belonged were handling at the time of his injury, were in the yard of the defendant at Port Reading,

N. J., and were empty, their interstate journey having ended. Plaintiff, realizing this, attempted to show that they had returned to interstate transportation, and was allowed to testify that the yardmaster had said to him, and other members of the crew, just before the accident, that they were to make up a train for a road engine "to take to the mines." By another witness it was shown that the mines referred to were anthracite mines in the State of Pennsylvania. The Court indicated through the trial that he believed the conversation related by the plaintiff with the yardmaster was hearsay, and should be stricken, but he held the defendant's motion for a non-suit until after the yardmaster testified. Thereupon he granted the motion to strike out, holding that the evidence was hearsay and was not a statement made by the yardmaster in the course of his duties, granting a non-suit on the ground that there was no evidence to show an interstate movement. No opinion was rendered by the District Court for the District of New Jersey. On appeal to the Circuit Court of Appeals the error alleged was the striking from the record of the plaintiff's testimony concerning the instructions given to the crew by the yardmaster. The plaintiff argued that no Court could say that the yardmaster had authority to instruct the crew "to make up 65 empties," and no authority to finish the sentence "for the mines." The Court affirmed the judgment of the District Court, saying: "The statement by the yardmaster was evidence that the work was done by direction and what the thing ordered to be done was * * * the trial Court was right in holding that the statement of the yardmaster was no evidence of the interstate character of the work done." Mirkowicz v. Reading Company, 84 Fed. (2) 537.

Certiorari was denied by this Court, 299 U. S. 579. In the petition for the writ the plaintiff averred that the trial Court committed reversible error in striking from the re-

cord plaintiff's testimony concerning the instructions and orders given to the crew by the yardmaster, and that the question of plaintiff's employment in interstate transportation was properly one for the jury.

In endeavoring to distinguish the instant case from the Mirkowicz case, plaintiff argued in the Court below that the conductor's declarations were corroborated by subsequent developments and the actual movement of the car in question, as shown by the Company's own records. In the Mirkowicz case, twenty-nine of the cars in the draft upon which the plaintiff was working at the time of the accident moved from New Jersey to the anthracite mines of Pennsylvania on the following day. This does not appear in the reported decision but it is set forth in the petition to this Court for writ of certiorari.

In the Mirkowicz case, the trial Court found that it was governed by the decision of the Circuit Court of Appeals for the Second Circuit in Central Railroad of New Jersey v. Sharkey, 259 Fed. 144, 146. In that case the plaintiff, a car repairman, testified that he had been told by his boss to make some repairs upon a car which the boss said was bound for Philadelphia. No objection was made to his testimony and no motion was made to strike out. In the argument before the Circuit Court of Appeals, counsel for the railroad company contended that testimony of the plaintiff as to statements made by his boss could not be taken as evidence of engagement by the plaintiff in interstate commerce. Of this contention the Court said:

> "But upon the argument in this court and in his brief counsel for the defendant state that 'the idle remark' made to the plaintiff by the deputized boss that, after finishing in the West Eighth Street yard, he was to go back to the yard from which he came and make repairs on the rush car for Philadelphia, was without

> any probative force whatever, and that the defendant's records would have been the very best evidence, and that McTernan, the boss, 'was right in court all the time, if it had been desired to question him.' It appears, however, that no objection was made in the court below to the admission of this testimony, and no exception was taken to it. *It may be conceded that this statement made to the plaintiff that this car was destined for Philadelphia was hearsay testimony, and not made in the performance of any duty which required the party who made it to inform plaintiff as to the destination of the car.* The person who made the statement which the plaintiff was allowed to repeat should have been himself called to testify that the car was destined for Philadelphia. But as no objection was offered, and, no exception taken, and no motion to strike out was made, it is too late now to say that the testimony was inadmissible and could not be considered by the jury." (Italics supplied)

The Court of Appeals in the case last cited commented upon the fact that the person alleged to have made the statements under consideration was not called as a witness. The Court said:

> "And the deputized boss, who told the plaintiff that he was to finish the rush job for Philadelphia, and who was the defendant's own employe, was not put upon the stand to contradict the plaintiff's testimony."

In the instant case, Yardmaster Cleckner testified that he had instructed Conductor Hocker to place the car on the coal trestle extension, and not under the dock, and that he had no knowledge with respect to its intended use. Conductor Hocker corroborated him in this and said that he had not informed the plaintiff that the car was to be

loaded with coal, having no information on the subject (R. 90).

In the Sharkey case no objection was made in the Court below to the admission of the hearsay testimony. In the present case, objection was made (R. 19). The admission of the conversation between the plaintiff and the conductor was the subject of the second reason contained in the motion for new trial (R. 148), was argued orally and on briefs in support of the motion for judgment n.o.v., and is discussed by the trial Court in the opinion refusing the motions for new trial and judgment for defendant on the points reserved (R. 153).

The Circuit Court of Appeals in the Mirkowicz case also cited with approval Central Railroad of New Jersey v. Sharkey, supra.

In McCoy v. Southern Pacific Company, evidence that a switchman's foreman, shortly before the accident, had stated that a freight car which was being switched at time of accident, resulting in switchman's injury, was soon to be sent out of the state was held to be inadmissible on issue whether switchman and railroad were engaged in interstate commerce.

McCoy v. Sou. Pac. Company 83 Pac. (2d.) 970.

This case was decided by the District Court of Appeals, First District, Division No. 2 of California, the Court citing Mirkowicz v. Reading Company supra. The Supreme Court of that State denied a hearing on September 29, 1938. On May 1, 1939 this Court denied certiorari; 59 S. C. 827; 83 L. E. 810. Twice, therefore, once in the Mirkowicz case, in 1936, and again in the McCoy case, in 1939, this Court declined to review decisions wherein hearsay testi-

mony as to conversations between a plaintiff and his superior in cases such as this, had been excluded.

In the recent case of Colangelo v. Pittsburgh & Lake Erie Railroad Company, the Supreme Court of Pennsylvania also relied upon Mirkowicz v. Reading Company, supra, and Central Railroad Company of New Jersey v. Sharkey, supra, saying:

> "There remains the question of the admissibility of the assistant yardmaster's oral instructions to the car inspectors on the morning of the accident. Reviewing the record, it seems to us that his direction to remove the cars to the Aliquippa shops for repairs was the full extent of his authority in this connection, which carried with it no authorization on his part to make any declaration respecting the ultimate destination of the cars. Plaintiffs did not prove that his statement to the effect that the cars "were to depart that night for East Rochester" was an essential or integral part of the instructions given to the car inspectors, nor that the work to be done at the Aliquippa shops was of such character that the nature and length of the journey would have affected their work upon the cars. As the court below said, the statement as to destination 'does not rise above the dignity of mere gossip between two employees.'
>
> "It is not sufficient that the information so given happened to be coupled with instructions which the yardmaster was fully authorized to issue: Mirkowicz v. Reading Co., 84 Fed. (2d) 537; Central R. Co. of N. J. v. Sharkey, 259 Fed. 144. In the latter case the explanation given that a car being prepared was "a rush car for Philadelphia" was held to be an "idle remark," unauthorized and unnecessary to the instructions. In the present case not only was the declaration in question gratuitious, and not required for the

proper discharge of the yardmaster's functions, but there was no showing that he was in a position to be accurately informed as to the ultimate destination of the cars. This evidence was, therefore clearly incompetent, and was properly excluded."

Colangelo v. Pittsburgh & Lake Erie Railroad Company, 336 Pa. 490.

THE EMPTY COAL CAR, READING NO. 73165, HAD NOT BEEN ASSIGNED TO ANY SERVICE AT THE TIME THE PLAINTIFF SUSTAINED HIS INJURY

If the hearsay testimony of the plaintiff, with respect to his conversation with Conductor Hocker, be disregarded, the uncontradicted proof is that the empty coal car, Reading No. 73165, was merely being shifted in the yard at the time of the accident, to be placed in storage for later use, and that no assignment to any service had been given to it. Yardmaster Cleckner, who was the only person authorized to give orders, testified that this car was being moved from the power house siding to make room for a loaded car which was to take its place, and that his instructions were to place it on the coal trestle extension for use when needed, and not under the coal trestle; that he did not know at the time what use would be made of it, as numerous commodities such as coal, soft and hard, sand, stone, et cetera, were frequently transferred at the dock (R. 81-85).

Conductor Hocker, who was the only person authorized to receive instructions from the yardmaster, testified that the car in question was to be spotted on the coal trestle extension, and that he did not know what would be placed in it (R. 89,90).

At the trial, some emphasis was placed upon the fact that the empty coal car was kept at the rear of the draft while being shifted, in order to facilitate the intended movement, as outlined by the plaintiff, to the track under the coal dock. The storage track, described by Yardmaster Cleckner and Conductor Hocker, is but an extension of the track passing under the coal dock, and the movement would have been in the same general direction whether the car was to be placed under the dock or on the extension. Even the plaintiff's testimony, reciting the instructions given to him by Conductor Hocker, did not show an assignment of this car to interstate transportation, as he did not know the kind of coal to be dumped, or the point of origin or destination of the crippled car. (R. 21, 31, 39). So far as his testimony shows, it might have been intended for use in connection with a shipment of anthracite coal, moving from one point in Pennsylvania to another within the State.

After the accident this car was placed under the coal dock by a different yard crew. Even then the yardmaster did not know what use would be made of it. (R. 87). Bituminous coal from C. R. R. of N. J. car No. 61373, which had arrived at Rutherford in a crippled condition, was placed in it and the car later moved out of the State on a through bill of lading from a point in West Virginia to Bethlehem, Pennsylvania. On this waybill the destination, Bethlehem, Pennsylvania, was crossed out and Jersey City, N. J., written above it. This alteration, of course, is immaterial as the coal was moving in interstate commerce. From the record it appears that the transfer of coal was made on January 9th, the day of the accident, but the hour is not shown. There is nothing to indicate that when the empty Reading car was placed under the coal dock, the crippled C. R. R. of N. J. car had been placed on top of the coal dock. No evidence was produced

as to which car was set in place first. It did not move out of Rutherford until January 10th.

At the time of the accident this car had not been assigned to any service but was to be used as needed. The fact that it subsequently developed that its next work was the continuance of an interstate movement is of no importance in determining the character of the plaintiff's employment at the time of injury:

Erie Railroad Co., v. Welsh, 242 U. S. 303.

Reese v. Pennsylvania Railroad Company, 118 Pa. Superior Ct. 112, 119.

"This is not like the matter of repairs upon a road permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, *not upon remote probabilities or upon accidental later events.*" (Italics supplied)

Minneapolis & St. Louis R. R. Co. v. Winters, 242 U. S. 353, 356.

"For a railroad company to be engaged in interstate commerce when moving empty cars along a local track to a loading point it must have definitely accepted and designated one or more of the units of the train for interstate uses, and be engaged in moving it along the line of its destiny."

Johnson v. Southern Pacific Company, 248 Pac. 501.

In N. Y. C. & H. R. R. v. Carr, this Court, in speaking of the cars there involved said:

> "The fact that they might soon thereafter be used in interstate business did not affect their intrastate status at the time of the injury; for, if the fact that a car had been recently used in interstate commerce, or was expected soon to be used in such commerce, brought them within the class of interstate vehicles, the effect would be to give every car on the line that character."
> N. Y. C. & H. R. R. v. Carr, 238 U. S. 260.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS CHARGE TO THE JURY

Your petitioner respectfully submits that as a matter of law, as heretofore contended, the interstate movement of the coal from West Virginia to New Jersey, originally contained in B. & O. No. 327256, had been broken and had been ended approximately a month before the accident, and that it was being transported in Reading No. 24626 from Rutherford, Pennsylvania, to Gettysburg, Pennsylvania, as an independent shipment.

Even assuming that the evidence with respect to the placement and use of the empty car, Reading No. 73165, was a matter for the jury, the Circuit Court of Appeals erred in denying a new trial. That Court found that the other two cars, Reading No. 83522, the ash car, and Reading No. 92095, the tool car, did not figure in a forward movement in interstate commerce. The District Court, however, submitted to the jury the question whether or not the plaintiff was engaged in interstate commerce while handling the four cars, or any one of them. (R. 122-127). The Circuit Court of Appeals in its opinion says:

"At best, the testimony for the defendant that the car was placed on the siding at the unloading dock merely for storage did no more than raise an issue of fact and, the testimony being oral, it was peculiarly for the jury to say whether that testimony was believable. The jury having presumably found that Car No. 73165 was being moved purposely by Larkin's crew to receive the cargo of coal from the 'crippled' car then in transit from West Virginia to New Jersey, it was proper for the jury to conclude, under the court's instruction, that Larkin was engaged in interstate commerce at the time of his injury."

The four cars in question left Rutherford each in a different train, within a day or two after the accident. Each train, in addition to the particular car here under consideration, contained, among others cars moving in interstate transportation. Testimony as to this was admitted over objection (R. 58-61). That these cars, destined from one point in Pennsylvania to another point in Pennsylvania, were subsequently moved from Rutherford in a train containing other cars moving between the States, has no bearing on the character of employment of plaintiff at the time of injury. The members of the over-the-road crew, by reason of the presence of interstate cars, were engaged in interstate transportation, for the reason that their services pertained to the entire train and were not separable. But this did not change a car moving in such a train in intrastate transportation into an instrumentality of interstate commerce, nor in any way affect the character of its service before being placed in the outbound train. Apparently, however, the trial court left it to the jury to determine whether or not this fact alone placed the plaintiff in interstate service at the time of his injury (R. 136). In reaching the conclusion that the plaintiff was engaged in interstate transportation, it is conceivable that the jury

may have based its verdict solely on the fact that all four cars left Rutherford in trains containing interstate cars. There is no foundation for the court's presumption that the jury had found that car No. 73165 was being moved to receive the coal from the crippled car. It is impossible to say upon the movement of which car the jury based its finding.

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a writ of certiorari should be granted.

Respectfully submitted,

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